

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 184 of 1981

Date of decision: 31-8-98

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAGHUBHAI MORAR

Versus

KANTABEN W/O SHANTILAL M

Appearance:

MR BHARAT J SHELAT for the appellant
MR S.C. Shah for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 31/08/98

ORAL JUDGEMENT

This second appeal is directed by the judgment debtor -appellant against the judgment and order passed in Civil Appeal No.5 of 1981 decided on 16th April, 1981 under which the order dated 20th January, 1981 passed by the Civil Judge (S.D.), Navsari in Execution proceedings being Regular Darkhast No.18 of 1977 has been confirmed. Briefly stated the facts of the case are that the subject matter of Regular Darkhast No.18 of 1977 for execution of decree is a piece of agricultural land admeasuring about 1 acre 33 gunthas forming part of Survey No.157 situate in Mouje Kara Kachha, Tal. Navsari, District Valsad. The decree holder - respondent filed Regular Civil Suit No.310 of 1964 against the judgment debtor -appellant for possession and injunction in respect of disputed agricultural land. The decree-holder in the suit aforesaid came up with the case that on the land in dispute the judgment debtor - appellant has made encroachment. This suit has been decreed by the trial court on 15th April, 1966 for possession and injunction as prayed for. The trial court ordered the defendant judgment debtor - appellant herein to hand over possession of the suit land to the plaintiff - decree holder -respondent herein. This judgment of the trial court has been challenged by the judgment debtor appellant by filing appeal being RCA 41 of 1966 in the court of District Judge, Valsad at Navsari, which came to be dismissed on 11-10-1971. He did not feel satisfied with the judgment of the appellate court and he had brought the matter before this court by filing Second Appeal No.571 of 1971, which was dismissed by this court on 31st January, 1977. When the decree of the trial court passed in Civil Suit No.310/1964 in favour of the decree holder - respondent attained finality the decree holder filed Regular Darkhast No.18 of 1977 on 7-3-1977 in the executing court for execution of the same.

2. As usual, and what it is stated in the thirties by the Privy Council that real trouble of the decree holder starts when he puts the decree for execution proved to be correct in this case. The decree holder respondent put the decree for execution, the judgment debtor -appellant having already lost in matter earlier in all the three courts raised all sorts of objections against execution of the decree. Execution of the decree has been contested by the judgment debtor - appellant on the ground inter alia that the same is not maintainable due to subsequent change of circumstances and particularly change in the law. In the submission of the

judgment debtor appellant by virtue of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 which has been made applicable to the village where the disputed land is situated, after operation of the scheme of consolidation of holdings, and issue of public as well as individual notices and compliance with the provisions of the aforesaid Act and the Rules framed thereunder, the State Government has enforced the said scheme under the Act and as such the subject matter of the execution proceedings i.e. the suit land has become part and parcel of new block No.162 and as a consequence thereof the original land has lost its identity and further as the new block No.162 cannot now be subdivided irrespective of the judgment and decree of the civil court, the civil court in execution proceedings cannot enter into such question and the decree now cannot be enforced, and as a result thereof the possession of the land cannot be taken from the defendant - judgment debtor --appellant and restored to the decree holder. This objection raised by the judgment debtor - appellant was not accepted by the executing court and the same has been rejected. Against this order he preferred appeal in the District Court, Valsad, which came to be decided against the appellant by the Assistant Judge, Valsad at Navsari, under the impugned order and hence this second appeal before this court.

3. Learned counsel for the appellant has raised only contention that in view of the fact that under the provisions of the Consolidation of Holdings and Prevention of Fragmentation Act, the land in question has been notified by the Consolidation Officer under the scheme framed by him and approved by the Government, and the land in question has become part of Block No.162, in case the decree is executed it will amount to subdivision of the block, which is otherwise prohibited under the said Act. In support of this contention learned counsel for the appellant- judgment debtor has placed reliance on the decision of the apex court in the case of Mst. Bibi Rahmani Khatoon & Ors. vs. Harkoo Gope & Ors. reported in AIR 1981 SC 1450.

4. In reply to the submission made by the learned counsel for the appellant, learned counsel for the respondent contended that both the courts have concurrently decided on the question of law and facts against the judgment debtor- the appellant herein and no question of law, much less substantial question of law, does arise in this second appeal and the appeal deserves to be dismissed by this court. It is next contended that the provisions of the aforesaid Act have not been

understood in their correct perspective by the learned counsel for the appellant. Otherwise such a contention could not have been advanced. It is the submission of the learned counsel for the appellant in total disregard of the real intention of the provisions of the Act. There is no provision in the Act which makes a decree passed by the civil court nugatory or unenforceable. It is next contended that everything taken worst against the decree holder- the respondent still there is provision for subdivision of the holding under the provisions of the Scheme framed under the said Act with the permission of the Collector. Further, learned counsel for the decree holder -respondent urged that in fact during the consolidation of holding proceedings the judgment-debtor -appellant has taken possession of the land from the officers in charge of those proceedings concealing the material fact that the civil court having had passed decree against him for the suit land which has been confirmed up to the High Court. Not only this, the judgment debtor - appellant has manipulated the proceedings before the Consolidation Officer so that the decree holder respondent was not given any notice or opportunity of hearing. Concluding his submissions, learned counsel for the decree holder respondent submitted that whatever decision taken by the Consolidation Officer under the Act in ignorance of the decree of the civil court in favour of the decree holder - respondent and without any notice to him is void ab initio. The judgment debtor appellant cannot be given benefit of the orders under the scheme as he got all these orders by fraud. Lastly it is urged by the learned counsel for the decree holder - respondent that the total area of the land of block No.162 is 68 acres and 20 sqmts. Out of this big piece of land, the land to the extent of the area as aforesaid can be chopped out by the judgment debtor -appellant and the same can be given to the decree holder -respondent.

5. I have given my thoughtful consideration to the submission made by the learned counsel for the parties.

- (1) Learned counsel for the judgment debtor -appellant has not disputed the factual aspect, namely, that block No.162 has been formed after merging therein the suit land.
- (2) Second, the total area of Block No.162 is of 68 acres and 20 sq.mts.
- (3) In the consolidation proceedings the judgment debtor -appellant has not brought to the notice

of the concerned Consolidation officer the fact that the decree has been passed in favour of the decree holder -respondent and against the judgment debtor appellant for this disputed land.

- (4) The Consolidation Officer and the revenue officers have not given notice or opportunity of hearing to the decree holder - respondent as per her case before merging the suit land in block No.162.
- (5) Before notification of the consolidation of holding proceedings by the State Government, civil suit was proceeded and reached to the stage of dismissal of the first appeal against the judgment and decree of the trial court filed by the judgment debtor -appellant and the matter was pending before this court in second appeal.
- (6) The judgment debtor appellant has not brought to the notice of this court in Second Appeal No.571 of 1971 that the State Government has already issued notification for preparation of the scheme of consolidation of holdings in the area in which the suit land is situated.
- (7) Two persons named Krishnalal Manilal and Sumatlal Manilal filed a suit bearing Regular Civil Suit No.360/71 against the decree holder and another suit in the Court of learned Civil Judge (S.D.), Navsari, for a declaration that the property in question bearing Sr.No.157 admeasuring about 6 Vighas and odd of village Kara Kachha belongs to them. The Civil Judge (S.D.), Navsari, vide its judgment and decree dated 4-3-1974, dismissed the said suit.
- (8) The judgment - debtor -appellant herein has filed Regular Civil Suit No.64/77 against the decree holder in the Court of learned Civil Judge (S.D.), Navsari, praying for permanent injunction to restrain the decree-holder from taking away the possession of the suit land on the ground of changed circumstances and in that suit he had also applied for temporary injunction. However, the prayer made for temporary injunction has been declined by the trial court vide its order dated 20-6-1977. The judgment -debtor had not felt satisfied with this order and he preferred Misc. Civil Appeal No.26 of 1977 against the said order before the District Judge, Bulsar at Navsari,

which came to be dismissed on 21st August, 1978.

6. From the facts aforesaid, I find that the Privy Council was correct to say in the thirties that the real trouble of a decree holder starts when he puts the decree in execution. It may not be as difficult to get a decree from the civil court as what it is difficult to get it executed and the present case clearly exhibits the difficulties of the decree holder. This decree has been passed in the year 1966 and more than 32 years have already passed, but the decree holder could not get it executed. It is a case where the judgment-debtor has tried to take benefit of his own creation of situation. What in fact has been done is that the land in dispute has been included in Block No.162 which is of considerably big area. It is not difficult, what to say impossible, to demarcate this portion which is part of this decree by the civil court in this matter. The only contention made is that under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, the division of survey which has been constituted on consolidation of holding is not permissible and secondly the civil court has no jurisdiction to decide such disputes.

7. This legal position has to be considered later on but I find from the judgment of the first appellate court that by formation of land in two different blocks, identity of the lands in question does not change. This finding recorded by the first appellate court seems to be correct. Identity of the land in dispute is not changed but what it has been done is that the land remains to be same but it has been made part of block No.162. Block No.162 has been consisted of consolidation of different holdings which are made part of this block number, are ascertainable and demarkable. So it is not impossible to ascertain and demarcate the land in dispute from block No.162. Section 31 of the said Act provides that notwithstanding anything contained in the law for the time being in force, no holding allotted under this Act, nor any part thereof shall be transferred whether by way of sale including sale in execution of the decree of a civil court or recovery of arrears of land revenue or for sums recoverable as arrears of land revenue or by way of gift, exchange, or lease, otherwise, except in accordance with such conditions as maybe prescribed. It has further been provided that such lands also cannot be sub divided including sub division by a decree or order of a civil court or any other competent authority except with the permission in writing of the Collector. From bare

reading of this provision of the section 31 of the Act it is clear that sub division of holding is permissible with permission in writing of the Collector. It is not the case of the judgment-debtor that the Collector has refused to permit sub division of this holding.

8. Now I may advert to another contention raised regarding powers or jurisdiction of civil court. Section 36A of the Act aforesaid provides that no civil court or Mamlatdar's court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority. It further provides that no order of the State Government or any such officer or authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdar's Court.

9. Reference may have to another provision of this Act, namely Section 36B which lays down that if any suit instituted in any civil court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act, civil court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination and said competent authority on receipt of such reference shall deal with and decide such issue in accordance with provisions of this Act and shall communicate its decision to the civil court or Mamlatdar's Court and such Court shall thereupon dispose of the suit in accordance with procedure applicable thereto. I fail to see, after reading of these two provisions, as to how the proceedings of execution are barred. The decision of the Hon'ble Supreme Court on which reliance has been placed by the learned counsel for the judgment-debtor has no application to the facts of this case as I do not find any specific provision in this Act where the proceedings of civil court abates on bringing of the lands in dispute under the consolidation scheme by the notification.

10. In the result, this Second Appeal fails and the same is dismissed. No order as to costs.

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